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Laborers' International Union of North America, Local 894 *and* Donley's, Inc. and International Union of Operating Engineers, Local 18

International Union of Operating Engineers, Local 18 and Donley's, Inc. and Laborers' International Union of North America, Local 310. Cases 08–CD–081837 and 08–CD–081840

January 10, 2014

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

This is a consolidated jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act. Donley's, Inc. (the Employer) filed a charge on May 25, 2012, as amended on June 4, 2012, alleging that Laborers' International Union of North America, Local 894 (Local 894) violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by International Union of Operating Engineers, Local 18 (Operating Engineers or Local 18). The Employer filed a second charge on May 25, 2012, alleging that Operating Engineers violated Section 8(b)(4)(D) by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Laborers' International Union of North America, Local 310 (Local 310). A hearing was held on July 23-26, 2012 before Hearing Officer Gregory M. Gleine. Thereafter, the Employer, Operating Engineers, and Locals 310 and 894 jointly (collectively referred to as Laborers) filed posthearing briefs. Operating Engineers also filed a motion to quash the Section 10(k) notice of hearing.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer is an Ohio corporation with its principal place of business in Cleveland. During the year prior to the hearing, the Employer purchased and received materials valued in excess of \$50,000 directly from points located outside the State of Ohio. The parties stipulated, and we find, that the Employer is engaged in commerce

within the meaning of Section 2(6) and (7) of the Act. The parties also stipulated, and we find, that Local 310, Local 894, and Operating Engineers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

The Employer is a contractor specializing in concrete construction and management services. Two of its construction projects in Ohio are at the center of the disputes in this case: the Flats East Bank Development project in Cleveland, which began in May 2011, and a parking garage for Goodyear in Akron, which began in November 2011.

The Employer assigned forklift work on the Flats East project to employees represented by Local 310. On this project, the Employer is signatory to Local 310's Building Laborers' Agreement with the Construction Employers Association (CEA), a multiemployer bargaining group of which the Employer is a member and to which it has assigned its bargaining rights. This agreement covers building construction work in Cuyahoga and Geauga Counties in Ohio, including Cleveland.

The Employer assigned forklift and skid steer work on the Goodyear project to employees represented by Local 894. For this project, the Employer is signatory to Local 894's Building Agreement with the Associated General Contractors of Ohio (AGC), another multiemployer bargaining group. This agreement covers building construction work in Summit, Portage, and Medina Counties in Ohio, including Akron.

The Employer is also signatory to separate collective-bargaining agreements covering building construction work between Operating Engineers and the CEA and the AGC, respectively. Operating Engineers-represented employees perform building construction work throughout Ohio.

Operating Engineers' building work agreement with the CEA covers the Ohio counties of Ashtabula, Cuyahoga, Erie, Geauga, Huron, Lake, Lorain, and Medina. The Flats East project is within the geographical jurisdiction of this agreement.

Operating Engineers' agreement with the AGC covers all counties in Ohio, except for those covered by Operating Engineers' agreement with the CEA. In addition to representing employer members that have assigned their bargaining rights to it, the AGC allows nonmembers to execute an acceptance of the AGC Ohio Building Agreement. The Employer, a nonmember, has individually signed the agreement intermittently since at least 1990. The Goodyear project is within the geographical jurisdiction of this agreement.

The Employer's assignment of building construction work on the Flats East and Goodyear projects to Laborers-represented employees has caused friction with Operating Engineers. Greg Przepiora, the Employer's general superintendent, and Mike Dilley, its vice president for concrete operations, testified that around March 2010, they met with Operating Engineers representatives David Russell and Steve DeLong. At this meeting, according to Przepiora and Dilley, Russell and DeLong claimed all forklift and skid steer work on all of the Employer's projects on behalf of employees represented by Operating Engineers.

Dilley and Przepiora further testified that the Employer ultimately rejected Operating Engineers' request for the work because it would be inefficient for Operating Engineers-represented forklift and skid steer operators to work on the Employer's projects. According to Dilley, the Employer assigns its forklift and skid steer work to employees represented by Laborers because their use of this machinery is incidental to the completion of their general work of tending to other tradesmen. Dilley testified that the employees represented by Operating Engineers are able to operate the forklifts and skid steers, but do not perform work to assist other trades. He stated that because the forklifts and skid steers are needed only 30-40 percent of the time on a project, it is not efficient to assign that work to Operating Engineers-represented emplovees.

Przepiora testified that at a Goodyear project prejob meeting in November 2011, Russell and Operating Engineers District Representative Joe Lucas demanded that the Employer reassign all forklift and skid steer work on that project to Operating Engineers-represented employees. Przepiora refused. According to Przepiora, Lucas then asked him how the Employer would complete the project without any Operating Engineers-represented employees onsite to operate the tower crane. The Employer had previously assigned operation of the tower crane to Operating Engineers-represented employees.

Przepiora testified that in February 2012, Russell told him that Operating Engineers would shut down the Goodyear jobsite if the Employer continued to refuse to assign the forklift and skid steer work on the project to employees represented by Operating Engineers. Local 894 Business Manager Bill Orr also testified that around this time, Russell told him that Laborers had been stealing Operating Engineers' work for the past 30 years. During the hearing, Russell did not deny that he made this statement.

Shortly thereafter, on February 22, Operating Engineers began a strike at the Goodyear jobsite, with picket lines at the entrances. Russell, Lucas, and Local 18 President Richard Dalton testified that, as stated on the picket signs, Operating Engineers struck because the Employer was not at that time signatory to the AGC Agreement that would cover the operation of the tower crane on the project by employees represented by Operating Engineers. On February 23, the Employer met with Operating Engineers and signed the AGC Agreement. Operating Engineers then ended the strike.

That same day, Przepiora and Don Dreier, the Employer's executive vice president, met with Lucas and Russell at another Goodyear prejob conference. Lucas informed Dreier and Przepiora that the Employer owed contractual damages to Operating Engineers, due to its failure to properly assign the forklift and skid steer work on the project to employees represented by Operating Engineers. The AGC and CEA agreements between Operating Engineers and the Employer each contain a provision stating that if the Employer assigns work within Operating Engineers' jurisdiction to employees not represented by Operating Engineers, the Employer must pay the proper wages and fringe benefits to the first qualified registered Operating Engineers-represented applicant from the first day of the violation. Przepiora testified that Lucas and Russell also explained that Operating Engineers had members who were trained and certified to operate forklifts and skid steers. Dreier and Przepiora refused to change the assignment.

On February 27, Operating Engineers filed grievances against the Employer for both the Goodyear and Flats East projects. The Goodyear grievance alleged that the Employer breached the 2010–2013 AGC Agreement by failing to assign its forklift and skid steer work on the project to employees represented by Operating Engineers. Similarly, the Flats East grievance alleged that the Employer breached the 2009–2012 CEA Agreement by failing to assign its forklift work on the project to Operating Engineers-represented employees. Both grievances requested contractual damages for the alleged breaches.

The Employer and Operating Engineers convened grievance meetings in late March and on April 20. At these meetings, the parties generally discussed the applicability of the contractual damages provisions and

¹ All subsequent dates are in 2012.

² Operating Engineers claims that it withdrew the Flats East grievance shortly after filing it. The Employer maintains that it has no record of the withdrawal

³ Operating Engineers representative Russell testified that it is Operating Engineers' policy to file pay-in-lieu grievances whenever it discovers Laborers-represented employees operating forklifts or skid steers for contractors that have agreements with Operating Engineers.

whether the controversy was a jurisdictional dispute. The parties disagreed on these points and were unable to resolve the grievances. Dilley and Przepiora testified that at the April 20 meeting, Operating Engineers' representative, Mark Totman, told them that the Employer would "be sorry" on May 1, because Operating Engineers would refuse to work on its jobsites.

After the April 20 grievance meeting, Dilley informed Local 894 Representative Orr that if the grievance committee, which includes representatives from the AGC and Operating Engineers, ruled in favor of Operating Engineers, the Employer would have to reassign the Goodyear project work to Operating Engineers-represented employees. On April 23, Orr responded that Local 894 adamantly opposed any transfer of its work on the project. He stated that Local 894 would picket and/or strike at the jobsites if necessary to protect its work assignments.

Also in April, the CEA bargained with Operating Engineers to renew their Agreement. CEA Executive Vice President Tim Linville testified that Operating Engineers proposed a provision quadrupling damages for an improper jurisdictional assignment. Linville further testified that Operating Engineers' representatives explained that the change was necessary in order to address contractors' longstanding practice of using employees represented by Laborers and other unions to perform forklift work claimed by Operating Engineers. Linville rejected the proposed change. The parties reached a tentative agreement on April 30, which was later ratified.

Linville testified that in or around June, he learned that Operating Engineers was attempting to compel CEA-member contractors to withdraw from the CEA and award their forklift and skid steer work to Operating Engineers-represented employees.

B. Work in Dispute

The notice of hearing described the work in dispute as "[t]he operation of forklifts and skid steers as part of concrete work being performed at the [Flats] East Development project located at 101 Front Avenue, Cleveland, Ohio," and "[t]he operation of forklifts and skid steers as part of the construction of a parking deck at the Goodyear jobsite located at 225 Innovation Way, Akron, Ohio." Operating Engineers argues that the notice of hearing improperly exceeded the scope of the charges, which referred to "forklift and related work," with the Goodyear jobsite listed as the location of the plant in-

volved.⁵ Therefore, it contends that due process requires that the work in dispute not include skid steer work or any work at the Flats East jobsite. Operating Engineers does not argue that it failed to receive proper notice of the broader scope of the hearing or that it was otherwise prejudiced by the wording of the charges. It also does not argue that the notice of hearing did not accurately reflect the actual work in dispute between the parties.

We reject Operating Engineers' due-process argument. All parties had ample prior notice of the scope of the inquiry. They had a full opportunity to adduce evidence, and they fully litigated the work in dispute as stated in the notice of hearing. In these circumstances, as tacitly acknowledged by Operating Engineers, there is no evidence of any prejudice stemming from the description of the work in dispute. See generally Operating Engineers Local 2 (PVO International), 209 NLRB 673, 673 fn. 2 (1974) (Board rejected due-process argument because party did not argue, nor did the record show, any prejudice stemming from the alleged omission); Longshoremen ILWU, Local 10 (Matson Navigation Co.), 140 NLRB 449, 451 fn. 2 (1963) ("the record shows that all of the parties were fully apprised at the hearing of the issues involved herein, and were not prejudiced by the wording of the charges and the notice of hearing"). We therefore find that the work in dispute is as set forth in the notice of hearing.

⁴ The record reflects that there is no dispute in this case about the assignment of skid steer work on the Flats East project. Accordingly, we need not determine the assignment of this work.

⁵ Operating Engineers contends that the notice should be quashed because it does not factually track the underlying unfair labor practice allegations, as assertedly required under cases such as *G. W. Galloway Co. v. NLRB*, 856 F.2d 275, 280 (D.C. Cir. 1988), and *Nickles Bakery of Indiana*, 296 NLRB 927, 929 (1989). Claiming that the notice of hearing "exceeds the scope of the charged allegations," Operating Engineers contends that the Regional Director acted without jurisdiction under Sec. 10(b) by originating a complaint upon his own initiative and that, under *G. W. Galloway*, the notice should be quashed.

Operating Engineers' reliance on G.W. Galloway is misplaced. That case held that the boilerplate statutory language of Sec. 8(a)(1) that is preprinted on an 8(a) charge form cannot, on its own, support a particularized 8(a)(1) complaint allegation because it would contravene 10(b)'s mandate that the Board "not originate complaints on its own initiative." 856 F.2d at 280 (emphasis added). See also Nickles Bakerv, supra at 928. However, a notice of hearing in a 10(k) proceeding to determine whether there is reasonable cause to believe that Sec. 8(b)(4)(D) has been violated is not, as Operating Engineers describes it, a "complaint," and the holding of G.W. Galloway and Nickles Bakery has not been extended to 10(k) cases. However, even if those cases applied here, a sufficiently close factual nexus exists between the charges and the notice of hearing. See Bay Counties Carpenters, 265 NLRB 646, 647-648 (1982) (rejecting argument that notice of hearing improperly exceeded the scope of the charges by including jobsites not specified in charges). Accordingly, we deny Operating Engineers' motion to quash the notice of hearing on this basis.

C. Contentions of the Parties

Operating Engineers moves to quash the notice of hearing, arguing that it has not claimed the disputed work and that there is no reasonable cause to believe that Section 8(b)(4)(D) has been violated. In support of its motion, Operating Engineers contends that it does not seek the reassignment of the disputed work, but rather the preservation of work for the employees it represents. It asserts that it simply pursued contractual grievances against the Employer for breaching the work assignment provisions of their collective-bargaining agreements, and that it requested only the contractually-prescribed damages for the breach. Operating Engineers also argues that its picketing of the Goodyear jobsite had a representational rather than jurisdictional objective, i.e., demanding that the Employer sign the AGC Agreement. Operating Engineers further contends that the Employer improperly created the appearance of a jurisdictional dispute by falsely informing Local 894 that Operating Engineers was seeking reassignment of the forklift and skid steer work on the Goodyear project.

Alternatively, if the notice of hearing is not quashed, Operating Engineers asserts that the work in dispute should be awarded to employees it represents, based on the factors of collective-bargaining agreements, area and industry practice, economy and efficiency of operations, employer preference, and relative skills and training. Operating Engineers argues that the evaluation of economy and efficiency of operations must take into account that, in its view, the Employer will have to pay contractual damages if the work in dispute is not awarded to Operating Engineers-represented employees. It also argues that the Employer's preference here is tainted by its attempt to avoid its contractual obligations to Operating Engineers. Operating Engineers opposes any request for a broad jurisdictional award.

The Employer and Laborers each contend that there is reasonable cause to believe that both Operating Engineers and Local 894 violated Section 8(b)(4)(D) by threatening to strike over job assignments. They further contend that there are competing claims to the disputed work, including Operating Engineers' two pay-in-lieu grievances, and that therefore the notice of hearing should not be quashed. Both the Employer and Laborers assert that there is no agreed-upon method for voluntary adjustment of the dispute.

On the merits, the Employer and Laborers assert that the work in dispute should be awarded to employees represented by Laborers based on the factors of past practice, employer preference, area and industry practice, and economy and efficiency of operations. Laborers further contends that the factors of collective-bargaining agreements and relative skills and training also favor awarding the disputed work to employees it represents. Finally, the Employer and Laborers argue that a broad award is warranted because disputes over the assignment of fork-lift and skid steer work will continue to arise on future projects, and because Operating Engineers has demonstrated a proclivity to engage in unlawful conduct to force the assignment of the disputed work to the employees it represents.

D. Applicability of the Statute

The Board may proceed with a determination of a dispute under Section 10(k) of the Act only if there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1139 (2005). This standard requires finding that there is reasonable cause to believe that there are competing claims to the disputed work and that a party has used proscribed means to enforce its claim to that work. Additionally, there must be a finding that the parties have not agreed on a method for the voluntary adjustment of the dispute. Id. We find that these requirements have been met.

1. Competing claims for work

We find that there is reasonable cause to believe that both Operating Engineers and Laborers have claimed the work in dispute for the employees they respectively represent. By its own admission, Laborers has done so, and the employees it represents have been performing the work. Moreover, on April 23, 2012, Local 894 threatened to picket and/or strike the Goodyear jobsite if the Employer reassigned the work in dispute to employees represented by Operating Engineers in response to Operating Engineers' claim. Operating Engineers contends that it did not claim the disputed work, as it was merely seeking to (a) obtain the Employer's signature on its agreement with the AGC, and (b) enforce the damages provisions in its agreements with the AGC and the CEA and preserve its right to perform the work in dispute. We reject Operating Engineers' arguments.

Even assuming that Operating Engineers' picketing had the lawful goal of obtaining the Employer's signature on its agreement with the AGC, this does not negate the evidence of Operating Engineers' claims to the disputed work. See *Operating Engineers Local 478 (Stone & Webster)*, 269 NLRB 655, 658 (1984). First, contrary to its argument, Operating Engineers effectively claimed the disputed work by filing the two February 27 pay-in-lieu grievances with the Employer. See, e.g., *Laborers Local 265 (AMS Construction)*, 356 NLRB No. 57, slip op. at 3 (2010) (pay-in-lieu grievance may constitute a competing claim for work); *Local 30, United Slate, Tile*

& Composition Roofers v. NLRB, 1 F.3d 1419, 1427 (3d Cir. 1993), enfg. 307 NLRB 1429 (1992) (attempted distinction "between seeking the work and seeking payment for the work is ephemeral"). In addition, as set forth above, witnesses for the Employer testified that during prejob and bargaining meetings, Operating Engineers representatives claimed the disputed work. The record also includes testimony that Operating Engineers was attempting to negotiate directly with contractors for the work.

2. Use of proscribed means

We find reasonable cause to believe that Local 894 and Operating Engineers each used means proscribed by Section 8(b)(4)(D) to enforce their claims to the work in dispute. As set forth above, on April 23, Local 894 informed the Employer that its members would strike if the Employer assigned work on the Goodyear and other jobsites to Operating Engineers.⁶ Further, Operating Engineers several times demanded the disputed work and threatened to strike if it did not receive it.

We reject Operating Engineers' argument that it has a work preservation claim to the forklift and skid steer work and that therefore no valid jurisdictional dispute exists between the parties. To prevail on this defense, Operating Engineers must show that the employees it represents have previously performed the work in dispute and that it is not attempting to expand its work jurisdiction. See, e.g., *Teamsters Local 174 (Airborne Express)*, 340 NLRB 137, 139 (2003). Operating Engineers has failed to make that showing. The record establishes that employees represented by Laborers have been performing the disputed work for at least 30 years. Where, as here, a union is claiming work for employees who have not previously performed it, the objective is not work preservation, but work acquisition. Id.

3. No voluntary method for adjustment of dispute

We further find no agreed-upon method for voluntary adjustment of the dispute. The Employer and Laborers so stipulated at the hearing, and Operating Engineers provided no evidence to the contrary.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various

factors. NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting), 364 U.S. 573, 577 (1961). The Board's determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. Machinists Lodge 1743 (J.A. Jones Construction), 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Board certifications and collective-bargaining agreements

The parties stipulated at the hearing that the work in dispute is not covered by any Board certification or order. Both Operating Engineers and Laborers, however, assert that their respective collective-bargaining agreements with the Employer entitle them to the disputed work.

Operating Engineers' agreement with the AGC includes a jurisdictional clause that describes the covered work as the erection, operation, assembly and disassembly, and maintenance and repair of various types of construction equipment. Operating Engineers' agreement with the CEA includes a similar jurisdictional clause that specifically identifies forklift and skid steer work. Both agreements include wage scale job classifications that reference both forklifts and skid steers.

The 2009-2012 Local 310 Building Laborers' Agreement and the 2011-2012 and 2012-2016 Local 894 Building Agreements all include a jurisdictional clause that applies "[w]here power is used in the moving, loading or unloading of concrete forms" and other materials as an adjunct to carpentry work. In addition, the 2011– 2012 and 2012–2016 Local 894 agreements provide a list of covered work classifications that includes forklift and skid steer work. The 2012-2016 agreement includes a revised provision stating in part that the operation of forklifts and skid steers "when used in the performance of the aforementioned work jurisdictions shall be the work of the Laborer." The 2012-2015 Local 310 agreement includes a revised jurisdictional clause that states in part that the operation of forklifts and skid steers "used for the purpose of tending [carpenters]" is work that belongs to employees represented by Laborers.

We find that both Operating Engineers and Laborers have language in their agreements supportive of their respective claims to the work in dispute. We therefore find that this factor does not favor awarding the work to employees represented by either union.

2. Employer preference and past practice

The Employer assigns the work in dispute to employees represented by Laborers and prefers that they contin-

⁶ Having found reasonable cause to believe that Operating Engineers claimed the work in dispute, we reject its argument that the Employer misrepresented Operating Engineers' demands and thus manipulated Local 894 into making the threat. Further, Operating Engineers offers no affirmative evidence that Local 894's threat was not genuine, or that it was the product of collusion with the Employer. See *Operating Engineers Local 150*, supra at 1140.

ue to perform the work. The Employer has a past practice of assigning similar work to Laborers-represented employees. Thus, we find that the factor of employer preference and past practice favors awarding the work in dispute to employees represented by Laborers.

3. Area and industry practice

Both Laborers and Operating Engineers presented dozens of recent letters of assignment from contractors, indicating that employees they represent have performed forklift and/or skid steer work for these contractors at various jobsites in Ohio. However, these letters do not specifically describe the work involved or the facts and circumstances surrounding the work. This evidence is therefore inconclusive.

Linville, the CEA's executive vice president, testified that the practice for the last 30 years has been for CEA employers to assign forklift and skid steer work to employees represented by Laborers. Dilley testified that he is on committees for both the American Concrete Institute and the American Society of Concrete Contractors, and that the contractors that are members of these organizations assign their forklift and skid steer work to Laborers-represented employees. Eddie Deaton, a field representative for the Laborers' District Council of Ohio, testified that it is well established that Laborers-represented employees operate forklifts and skid steers throughout Ohio.

In contrast, Operating Engineers offered limited testimony as to any area practice of using employees it represents to perform work of the type that is in dispute. Lucas testified that as an Operating Engineers representative in its District Six (Akron) office since 1998, he has received "several" referrals for forklift and skid steer work. Lucas also testified that the National Maintenance Agreement Policy Committee determined that employees represented by Operating Engineers should perform forklift work on jobsites covered by the National Maintenance Agreement (NMA). However, Local 310 Business Agent Mike Kearney testified that the practice under the NMA is different from that on building sites within Laborers' geographical jurisdictions. In its posthearing brief, Operating Engineers acknowledged that the NMA applies only to work performed at power plants.

Furthermore, Przepiora and Orr, Employer and Local 894 representatives, respectively, testified that shortly before the strike at the Goodyear jobsite, Russell separately told each of them that Operating Engineers had ceded forklift and skid steer work to Laborers-represented employees for the past 30 years. Russell admitted that it was "very possible" that he had made such a statement to Orr. This testimony suggests that employees represented by Operating Engineers have not

in the recent past performed work of the type that is now in dispute within Laborers' geographical jurisdictions.

Based on the above evidence, we find that this factor favors an award of the work in dispute to employees represented by Laborers.

4. Relative skills and training

Dreier, Dilley, and Przepiora testified that the Employer may provide the necessary certification and/or training for employees to operate a forklift. Dreier and Przepiora testified that if the Employer does not provide the necessary training and/or certification, the Ohio Laborers' Training Program will provide it. Ralph Cole⁷ testified that Laborers has a main Ohio training site in Howard, Ohio, as well as a satellite training site in Cleveland. Orr and Deaton testified that Laborers-represented employees who take forklift or skid steer classes must pass tests showing their ability to operate these machines. Dreier, Dilley, Przepiora, and Kearney testified that employees represented by Laborers possess the necessary skills to operate forklifts and skid steers on the Employer's projects.

Donald Black, the administrative manager of the Ohio Operating Engineers Apprenticeship Training Fund, testified that Operating Engineers has four training sites in Ohio. At these sites, Operating Engineers offers forklift and skid steer classes that include written examinations and practical skills tests. Black testified that Operating Engineers certifies about 250 members each year for forklift work, and that from July 2011 until July 2012, it certified 107 apprentices for skid steer work.

On this record, we find that employees represented by Laborers and those represented by Operating Engineers possess the skills and training necessary to perform the work in question. This factor, therefore, does not favor an award of the disputed work to either group of employees.

5. Economy and efficiency of operations

The Employer's witnesses testified that it would not be economically efficient to assign the disputed work to employees represented by Operating Engineers. Dreier and Cole testified that operation of the forklifts and skid steers on the Flats East and Goodyear projects is only intermittent. Dreier, Orr, and Terry Joyce, Local 310's business manager, testified that the Employer's agreement with Laborers allows Laborers-represented employees to perform other types of work when the forklifts or skid steers are not in use. In contrast, according to

 $^{^7\,\}mathrm{Cole}$ is the business manager for the Ohio Laborers' District Council, as well as the vice president at large of Laborers' International Union of North America.

Dreier and Dilley, the Employer's agreement with Oper-Engineers prohibits Operating represented employees from performing these other types of work at the jobsites. Operating Engineers did not dispute this testimony or offer any contrary evidence. Accordingly, because the employees represented by Laborers are able to perform additional work on these projects, reducing the Employer's payment of wages for idle time, this factor favors an award of the work in dispute to those employees.⁸ See, e.g., Laborers (Eshbach Bros., LP), 344 NLRB 201, 204 (2005) (greater versatility of Laborers-represented employees supported award of disputed work to them instead of employees represented by Operating Engineers); Wisconsin Laborers District Council (Miron Construction Co.), 309 NLRB 756, 757 (1992) (same).

Conclusions

After considering all of the relevant factors, we conclude that employees represented by Laborers are entitled to perform the work in dispute. We reach this conclusion relying on the factors of employer preference and past practice, area and industry practice, and economy and efficiency of operations, all of which favor Laborers-represented employees. In making this determination, we award the work to employees represented by Laborers, not to that labor organization or to its members.

Scope of the Award

The Employer and Laborers request that our award in this proceeding encompass all projects throughout Local 18's geographic jurisdiction, which includes most of the State of Ohio. While recognizing that its relationship with Laborers has "started to deteriorate," Operating Engineers opposes a broad award. It argues that the Employer and Laborers have not met their burden of showing that the disputed work has been a continuous source of controversy, or that Operating Engineers has a proclivity to engage in unlawful conduct in an effort to obtain similar work. We agree with Operating Engineers that a broad award is not warranted here.

"Normally, [Section] 10(k) awards are limited to the jobsites where the unlawful [Section] 8(b)(4)(D) conduct occurred or was threatened." *Chicago and Northeast*

Illinois District Council of Carpenters (Prate Installations, Inc.), 341 NLRB 543, 546 (2004). For the Board to issue a broad award, two prerequisites must be met. There must be: "(1) evidence that the disputed work has been a continuous source of controversy in the relevant geographic area and that similar disputes may recur; and (2) evidence demonstrating the offending union's proclivity to engage in further unlawful conduct in order to obtain work similar to that in dispute." Id., citing Electrical Workers Local 363 (U.S. Information Systems). 326 NLRB 1382, 1385 (1998). When evaluating these prerequisites, the Board looks to the offending union's other conduct. See Electrical Workers Local 98 (Swartley Bros. Engineers), 337 NLRB 1270, 1273 (2002). Moreover, the Board generally refuses to issue an areawide award when a charged party represents the employees to whom the work is awarded and to whom the employer contemplates continuing to assign the work. See, e.g., Laborers Local 265 (AMS Construction, Inc.), 356 NLRB No. 57, slip op. at 6.

We agree with Operating Engineers that the Employer and Laborers have failed to establish that, as of the date when this controversy arose, the disputed work was a continuous source of controversy within Local 18's jurisdiction. We acknowledge that some record evidence suggests that Operating Engineers claimed similar work on other projects and made related threats concerning these projects. The record includes evidence that on some projects, Operating Engineers may have filed or threatened to file grievances against the Employer or other employers regarding the assignment of forklift and skid steer work. However, based on the paucity of evidence about these projects and Operating Engineers' conduct, and the limited scope of the dispute here, we cannot find that the Employer and Laborers have made the requisite showing that similar disputes are likely to arise in the future. We further note that there are no prior Board determinations involving disputes between these parties. Therefore, the Employer and Laborers have also failed to show that Operating Engineers has demonstrated a proclivity to engage in further proscribed conduct in order to obtain similar work. See Glaziers District Council 16 (Service West), 357 NLRB No. 58, slip op. at 3 (2011).

Accordingly, in the circumstances here, we find that a broad order is not warranted. Therefore, the present de-

⁸ Operating Engineers argues that the Employer's assignment of the work in dispute to employees represented by Laborers is not economical, taking into account the potential damages resulting from the Employer's alleged breach of the AGC and CEA agreements. We reject this argument because pursuing a pay-in-lieu grievance after the Board awards work that is in dispute violates Sec. 8(b)(4)(ii)(D). See *Iron Workers Local 433 (Otis Elevator)*, 309 NLRB 273, 274 (1992), enfd. 46 F.3d 1143 (9th Cir. 1995).

⁹ Member Johnson agrees, in the circumstances of this case, that a broad award is not appropriate but does not rely either on his colleagues' analysis of what constitutes proclivity or on *Glaziers District Council 16 (Service West)*, 357 NLRB No. 58 (2011).

termination is limited to the particular controversies that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

- 1. Employees of Donley's Inc., represented by Laborers' International Union of North America, Local 310, are entitled to perform the operation of forklifts as part of the concrete work being performed at the Flats East Development project located at 101 Front Avenue, Cleveland, Ohio.
- 2. Employees of Donley's Inc., represented by Laborers' International Union of North America, Local 894, are entitled to perform the operation of forklifts and skid steers as part of the construction of a parking deck at the Goodyear jobsite located at 225 Innovation Way, Akron Ohio.
- 3. International Union of Operating Engineers, Local 18 is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Donley's Inc. to assign the disputed work to employees represented by it.

4. Within 14 days from this date, International Union of Operating Engineers, Local 18 shall notify the Regional Director for Region 8 in writing whether it will refrain from forcing Donley's Inc., by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

Dated, Washington, D.C. January 10, 2014

Mark Gaston Pearce,	Chairman
Kent Y. Hirozawa	Member
Harry I. Johnson, III,	Member

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